

Federalism and Sentencing Reform in the Post-*Blakely*/Booker Era

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In 1973, federal district judge Marvin Frankel changed the terms of the debate about criminal sentencing in America when he published his brief, but provocative book, *Criminal Sentences: Law Without Order*.¹ Judge Frankel argued that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”² He maintained that “individualized sentencing has gotten quite out of hand. . . . [I]ndividualized justice is prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law.”³ Frankel criticized sentencing institutes,⁴ the shortcomings of judicial selection and education,⁵ parole,⁶ and indeterminate sentencing.⁷ But of course Judge Frankel did not publish a mere diatribe. Judge Frankel advocated reform. He offered proposals to lawmakers for legislation about the purposes and procedures of sentencing⁸ and, most notably, suggested that Congress create a permanent agency

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¹ See also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). Kevin Reitz in 1993 described Judge Frankel’s book as the “most influential work of criminal justice scholarship in the last [twenty] years.” Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 650 n.21 (1993). Douglas Berman added more recently that “Judge Marvin Frankel’s powerful insights and criticisms concerning federal sentencing practices are rightly credited for fueling the modern sentencing reform movement over three decades ago.” Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 279 n.10 (2005); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 35–37 (1998).

² MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973).

³ *Id.* at 10.

⁴ *Id.* at 61–68.

⁵ *Id.* at 13–25.

⁶ *Id.* at 94–96.

⁷ *Id.* at 26–49, 86–102.

⁸ *Id.* at 103–11.

that he termed a “Commission on Sentencing.”⁹ Frankel was the “father of sentencing reform,”¹⁰ and we are all indebted to him.

During my tenure as a state attorney general from 1997 to 2004, I considered myself a sentencing reformer.¹¹ My office drafted and successfully lobbied for the legislation that created the Alabama Sentencing Commission.¹² Before my term as attorney general ended, the Commission began its long-term campaign to dismantle a regime of explosive growth in the prison population, disparities and dishonesty produced by indeterminate sentencing, and a system of corrections that offered few alternatives to incarceration as a form of punishment.¹³ Our hope was to create over time a system of voluntary sentencing guidelines to the end that criminal sentencing in Alabama could be made honest, fair, and rational.¹⁴

My contributions to sentencing reform in Alabama ended in February 2004, when President George W. Bush appointed me first to serve temporarily as a circuit judge on the United States Court of Appeals for the Eleventh Circuit and later to a term of good behavior, which was confirmed by the Senate in 2005. In the meantime, the theater of sentencing changed dramatically—both for the states and the federal government—when the Supreme Court decided *Blakely v. Washington*¹⁵ in 2004 and *United States v. Booker*¹⁶ in 2005. I have had a front row seat as this play unfolded.

Although I consider myself a generalist in the performance of my public service, my experiences over the last dozen years have given me a comparative perspective of sentencing guidelines and scholarship. Over the last several years, I have participated in the adjudication of hundreds of federal appeals of criminal convictions and sentences and the collateral review of hundreds of state convictions and sentences. I have followed the successful, but often ignored, efforts of state sentencing commissions and reform movements and served as part of the members’ consultative group of the revision of the sentencing provisions of the Model Penal Code.¹⁷ I also have read scholarship about and discussed with colleagues the widespread dissatisfaction with the federal sentencing guidelines.

⁹ *Id.* at 118–24.

¹⁰ STITH & CABRANES, *supra* note 1, at 35 (quoting Sen. Edward M. Kennedy).

¹¹ See William H. Pryor Jr., Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, Keynote Address at the Columbia Law Review Symposium: Sentencing: What’s at Stake for the States?, *Lessons of a Sentencing Reformer from the Deep South* (Jan. 21, 2005), in 105 COLUM. L. REV. 943 (2005).

¹² ALA. CODE §§ 12-25-1 to -38 (LexisNexis 2005).

¹³ Pryor, *supra* note 11, at 944–46.

¹⁴ *Id.* at 954–55; see also Joseph A. Colquitt, *Can Alabama Handle the Truth (in Sentencing)?*, 60 ALA. L. REV. 425 (2009).

¹⁵ 542 U.S. 296 (2004).

¹⁶ 543 U.S. 220 (2005).

¹⁷ For an introduction to this project of The American Law Institute, see Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525 (2002).

My perspective, shaped by these last several years of experience and reflection, is that, although sentencing reform is in a state of flux and challenge, it remains every bit the worthwhile effort that Judge Frankel championed in the early 1970s. These days, many scholars and even some federal judges consider the federal sentencing guidelines a “failure,”¹⁸ but my criticisms of the federal system are far less harsh. I remain a big fan of state sentencing reform. But I admit that the future of both federal and state sentencing reform is uncertain and even precarious.

I also have a perspective of federalism,¹⁹ shaped by my experience as a state attorney general, federal judicial servant, and teacher of federal jurisdiction, that a structural problem underlies the current challenges to federal and state sentencing reform. This structural problem involves the federalization of crime. In the spirit of making a modest contribution to the vision of the great reformer, Judge Frankel, I submit that sentencing commissions and lawmakers should consider this structural problem and together find creative solutions to the current challenges for sentencing reform.

My hope for sentencing reform is rooted in a respect for federalism, a venerable feature of the American constitutional order. Restoring some respect for federalism in criminal law might help bridge the political divide between the left and the right, the judicial divide between formalists and pragmatists, and the sentencing divide between individual sentencing and consistency in sentencing. To restore respect for federalism, we must reverse the federalization of crime.

To explain my perspective, I will address three matters. First, I will explain some of the challenges that confront sentencing reform in this post-*Blakely* and *Booker* era. Second, I will explain why the federalization of crime has made the federal sentencing guidelines controversial and relatively unpopular. I will also address how this structural issue explains both the relative success of state sentencing commissions and the nevertheless daunting obstacles that they face in their work. Third, I will offer some proposals for reform rooted in a respect for federalism that might promote better sentencing in the future.

¹⁸ Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 685 (2009); see also MODEL PENAL CODE: SENTENCING REPORT 115–24 (2003); MICHAEL TONRY, SENTENCING MATTERS 72–73 (1996); Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 239 (2008); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315–18 (2005); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 726 (1999). See generally STITH & CABRANES, *supra* note 1.

¹⁹ See, e.g., William H. Pryor Jr., *Federalism and Freedom: A Critical Review of* ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY, 83 TUL. L. REV. 585 (2008) (book review); William H. Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167 (2002); William H. Pryor Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361 (2002); William H. Pryor Jr., *Federalism and Congressional Reform of National Class Actions* (Wash. Legal Found., Working Paper No. 111, 2002).

I. POST-BLAKELY/BOOKER CHALLENGES TO SENTENCING REFORM

Many of the current challenges that confront sentencing reform are rooted in the controversial nature of the federal system of guidelines. It has long been the proverbial elephant in the room. “The federal government,” as Frank Bowman put it, “has been a leader—for good or ill—both in its increased reliance on incarceration as a crime control mechanism and in its embrace of structured sentencing.”²⁰

For more than a decade, most sentencing scholars have argued that the federal sentencing guidelines are too rigid, too complex, and too heavily tilted toward the power of the prosecutor and incarceration as the preferred method of punishment.²¹ An early example of that scholarship was the powerful book by Kate Stith and Judge José Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, which in 1998 presciently called for a system of voluntary guidelines.²² Michael Tonry had written two years earlier that the federal sentencing guidelines “are the most controversial and disliked sentencing reform initiative in U.S. history.”²³

For a long time, Bowman was a self-avowed “supporter” and defender of the federal guidelines, but in 2005, “with the greatest reluctance, [he] concluded that the federal sentencing guidelines system ha[d] failed.”²⁴ He wrote that he had “reached this conclusion not merely because the system too often produces bad outcomes in individual cases and sometimes in whole classes of cases, but more importantly because the basic structure of the guidelines-centered system has evolved in a way that makes self-correction virtually impossible.”²⁵ The Reporter for the revision of the Model Penal Code provisions for sentencing, Kevin Reitz, wrote in 2009 that “the federal system is widely regarded as a failure.”²⁶

Although I appreciate many of the criticisms of the federal guidelines, I would not call the system a failure. To me, a failure of the guidelines means that we would prefer the earlier system of indeterminate sentencing that Judge Frankel criticized in the 1970s. I do not prefer the old system. I agree with Judge Gerard Lynch of the Second Circuit who wrote recently, “No one today advocates a return to the unbridled discretion and total indeterminacy that characterized sentencing in the 1950s and 1960s.”²⁷ Most of my experience so far, to be sure, involves the

²⁰ Bowman, *supra* note 18, at 1318.

²¹ See TONRY, *supra* note 18, at 72; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

²² STITH & CABRANES, *supra* note 1, at 174–77.

²³ TONRY, *supra* note 18, at 72.

²⁴ Bowman, *supra* note 18, at 1319.

²⁵ *Id.*

²⁶ Reitz, *supra* note 18, at 685.

²⁷ Gerard E. Lynch, *Marvin Frankel: A Reformer Reassessed*, 21 FED. SENT’G REP. 235, 239 (2009). When the U.S. Sentencing Commission surveyed federal district judges about which system “best achieves the purposes of sentencing,” only eight percent of the judges responded, “No guidelines, such as the system in effect before the federal sentencing guidelines became effective in 1987.” U.S.

application of the post-*Booker* system of advisory guidelines, and this new system is more popular among both scholars and federal judges.²⁸ Even so, I would prefer a system of mandatory guidelines to the dishonest and arbitrary system of indeterminate sentencing that Judge Frankel rightly described as law without order.

Nevertheless, the unpopularity of the federal sentencing guidelines plainly has unfortunate consequences. Professor Reitz has complained that sentencing scholarship is “federal-centric,”²⁹ and that complaint is easy to document. As he explained, “[A]n overwhelming share of academic writing on criminal sentencing law deals exclusively with the federal system,”³⁰ and that fact leads to what he calls “a gaping weakness in our national law reform discourse.”³¹ One of the greatest challenges that we faced, in the early stages of sentencing reform in Alabama, was the education of judges and lawyers that our system of voluntary guidelines, when we created it, would not follow the federal model.³² Tonry and others came to Alabama to explain to our judges how state guidelines could work well.³³

Although state sentencing reform is more important, more interesting, and more successful,³⁴ its study is “badly neglected”³⁵ because of the national controversies that plague the federal guidelines and attract scholarly criticism. More than 95 percent of criminal prosecutions occur under state laws, the vast majority of prisoners are incarcerated by state agencies, the most innovative programs for alternatives to incarceration are operated by state authorities, and the overwhelming number of law enforcement authorities in America are officers of state and local governments.³⁶ The states are where Judge Frankel’s ideas have produced the most innovative and successful systems of guidelines, but few scholars study them.³⁷

SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010). *But see* Adelman & Deitrich, *supra* note 18, at 241–42.

²⁸ When the U.S. Sentencing Commission asked federal district judges which sentencing system “best achieves the purposes of sentencing,” seventy-five percent responded, “The current advisory guidelines system.” U.S. SENTENCING COMM’N, *supra* note 27, at tbl.19; *see also* Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSJCL AMICI: VIEWS FROM THE FIELD (Jan. 2008), <http://osjcl.blogspot.com>.

²⁹ Reitz, *supra* note 18, at 684.

³⁰ *Id.* at 685.

³¹ *Id.*

³² Pryor, *supra* note 11, at 948–49.

³³ *Id.* at 949.

³⁴ Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1351 (2005) (“Many state sentencing reforms appear to be far more successful—more principled, more popular, more consistent, more modest, more useful—than the federal guidelines.”).

³⁵ Reitz, *supra* note 18, at 684.

³⁶ Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1305 n.140–41 (2005); Reitz, *supra* note 18, at 698.

³⁷ Reitz, *supra* note 18, at 684–85.

Against this backdrop of controversial federal guidelines and successful state reforms, the paradigm for all sentencing reform changed abruptly and dramatically in 2004 when the Supreme Court decided *Blakely v. Washington*.³⁸ The Court held, by a 5-4 vote, that a defendant has a right, under the Sixth Amendment, to require the state to prove to a jury, beyond a reasonable doubt, an aggravating fact that would increase the defendant's punishment under a system of sentencing guidelines.³⁹ In her dissenting opinion, Justice Sandra Day O'Connor wrote, "What I have feared most has now come to pass: Over [twenty] years of sentencing reform are all but lost."⁴⁰

Justice O'Connor predicted that the legacy of *Blakely* would be "the consolidation of sentencing power in the State and Federal Judiciaries."⁴¹ She wrote, "The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly."⁴² "Her particular concern was that many jurisdictions would abandon successful sentencing guidelines reforms . . . [to avoid paying] the 'constitutional tax' of setting up bifurcated jury fact-finding proceedings—a first trial for guilt and innocence, and a second to determine sentencing facts."⁴³

In 2009, Reitz surveyed the landscape and determined that *Blakely* had caused real harm to state sentencing reform, as Justice O'Connor had predicted.⁴⁴ Since *Blakely*, only Alabama has joined the ranks of states moving toward adopting sentencing guidelines,⁴⁵ and that effort began years earlier.⁴⁶ Other states have converted from systems of presumptive guidelines to what Reitz and The American Law Institute consider to be less desirable systems of advisory guidelines.⁴⁷

In her dissent in *Blakely*, Justice O'Connor also accurately predicted the vulnerability of the federal sentencing guidelines,⁴⁸ but the next year, in *United States v. Booker*,⁴⁹ Justice O'Connor joined Justice Stephen Breyer's remedial opinion, which rescued the continued operation of the federal guidelines by making

³⁸ 542 U.S. 296 (2004).

³⁹ *Id.* at 301-04.

⁴⁰ *Id.* at 326 (O'Connor, J., dissenting).

⁴¹ *Id.* at 314.

⁴² *Id.*

⁴³ Reitz, *supra* note 18, at 697.

⁴⁴ *Id.* at 698 ("[T]here have already been 'disastrous' practical consequences in *Blakely*'s wake." (quoting *Blakely v. Washington*, 542 U.S. 296, 314 (2004) (O'Connor, J., dissenting))).

⁴⁵ *Id.* at 702.

⁴⁶ Pryor, *supra* note 11, at 948-51.

⁴⁷ Reitz, *supra* note 18, at 701; cf. John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006).

⁴⁸ 542 U.S. at 325 (O'Connor, J., dissenting).

⁴⁹ 543 U.S. 220 (2005).

them advisory with appellate review for reasonableness.⁵⁰ No federal judge who served when *Booker* was decided and in the following years will soon forget the confusion that accompanied that decision and that, to some degree, still persists. Although *Blakely* came before *Booker*, I suspect that judicial reservations about the federal guidelines helped produce the result in *Blakely*.⁵¹

Whether *Booker* made the federal system better is still a matter of debate. Three years ago, Judge Gerard Lynch, while he still served as a district judge, expressed what is plainly the view of most federal district judges when he wrote, “[W]e are far better off today than we were under the prior mandatory guidelines regime.”⁵² Sentencing scholars agree with that perspective, but they remain critical of several remaining features of the federal guidelines, such as the use of real-offense sentencing instead of conviction-offense sentencing.⁵³ There are also both unresolved problems and important detractors in our new system of advisory guidelines.

As a circuit judge, I must confess that one of the unresolved problems about the advisory guidelines is the uncertainty that still exists about the scope of our review of federal sentences for reasonableness.⁵⁴ The Supreme Court has clarified some matters in *Rita v. United States*,⁵⁵ *Gall v. United States*,⁵⁶ and *Kimbrough v. United States*,⁵⁷ but if you want a peek at the uncertainty that remains, then you need go no further than the en banc opinion of my court issued in July 2010 in *United States v. Irey*,⁵⁸ which comprises six separate opinions and over 100 pages. Judge Edward

⁵⁰ *Id.* at 244–71.

⁵¹ Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 261 (2004) (“*Blakely* can only be fully understood in the context of this recent history. The leaders of a judiciary feeling itself *in extremis* did an extreme thing in response.” (footnote omitted)). I also do not regard it as a coincidence that the author of the majority opinion in *Blakely* was Justice Antonin Scalia who had been the lone dissenter in *Mistretta v. United States*, 488 U.S. 361, 412 (1989), which had upheld as constitutional the power of the United States Sentencing Commission to promulgate the federal sentencing guidelines.

⁵² Lynch, *supra* note 28, at 1; U.S. SENTENCING COMM’N, *supra* note 27, at tbl.19.

⁵³ See, e.g., Reitz, *supra* note 18, at 698 n.69 (“My view is that the federal system has been marginally changed, probably for the better, but most of the features I found objectionable prior to *Booker* remain in place.”); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 548–65 (1993).

⁵⁴ For two thoughtful views of federal judges on this topic, see Lynch, *supra* note 28, at 5 (“If we are going to let (district) judges be judges, and trust them to exercise the necessary discretion with sensitivity to the need for coherent sentencing policy, so we should let (appellate) judges be judges as well, performing *their* traditional function of reining in excess and gradually developing a ‘common law’ of what is and is not sensible.”) and Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79, 86 (2007) (appellate courts should “treat the guidelines as an organizing principle”).

⁵⁵ 551 U.S. 338 (2007).

⁵⁶ 552 U.S. 38 (2007).

⁵⁷ 552 U.S. 85 (2007).

⁵⁸ 612 F.3d 1160 (11th Cir. 2010).

Carnes forcefully stated for the majority, which I joined, that a sentence can be so outside the range of reasonable sentences for a heinous crime, after weighing all the relevant sentencing factors with substantial deference to the district court, as to be unreasonable as a matter of law,⁵⁹ and Judge Larry Edmondson stated well, in dissent, the opposing perspective of several judges that the weighing of sentencing factors is committed to the sound discretion of the district court and cannot be overturned absent an erroneous interpretation of the governing law or a clear error in factual finding.⁶⁰

In *Booker*, the Supreme Court stated that appellate review “would tend to iron out sentencing differences,”⁶¹ but there is a sharp debate in the circuit courts about how we are to police disparities. The circuits are in agreement that review for reasonableness is deferential,⁶² but three circuits, besides the Eleventh, have

⁵⁹ See *id.* at 1196.

⁶⁰ See *id.* at 1272–73 (Edmondson, J., dissenting).

⁶¹ *United States v. Booker*, 543 U.S. 220, 263 (2005).

⁶² See, e.g., *United States v. Merced*, 603 F.3d 203, 214 (3d Cir. 2010) (“[O]ur substantive reasonableness inquiry must be highly deferential.”); *United States v. Mendoza-Mendoza*, 597 F.3d 212, 218–19 (4th Cir. 2010);

It would be wholly contrary to the Supreme Court’s conferral of discretion on trial courts if we were to play a game of ‘Gotcha!’ with respect to the sentencing transcripts we review. This appellate deference is especially appropriate when Guidelines sentences are imposed because in such a case the judgment of the sentencing court and the judgment of the Sentencing Commission have converged.

Id. (citation omitted); *United States v. Vrdolyak*, 593 F.3d 676, 683 (7th Cir. 2010) (“Review turns deferential when the issue is the substantive reasonableness . . . of the sentencing determination.”); *United States v. Stewart*, 590 F.3d 93, 135 (2d Cir. 2009);

Our role is no more than to patrol the boundaries of reasonableness. Indeed, we must defer heavily to the expertise of district judges, and will set aside a district court’s substantive determination only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions.

Id. (citations and internal quotation marks omitted); *United States v. Carter*, 560 F.3d 1107, 1120 (9th Cir. 2009) (“We consider the substantive reasonableness of a sentence under an abuse-of-discretion standard . . . [and] give substantial deference to the district court’s determination”); *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (“When reviewing a sentence for substantive reasonableness, this court employs the abuse-of-discretion standard, a standard requiring substantial deference to district courts.” (citation and internal quotation marks omitted)); *United States v. Gardellini*, 545 F.3d 1089, 1093 (D.C. Cir. 2008) (“It will be the unusual case when an appeals court can plausibly say that a sentence is so unreasonably high or low as to constitute an abuse of discretion by the district court.”); *United States v. Thurston*, 544 F.3d 22, 25 (1st Cir. 2008) (“[T]he sentencing decisions of district courts should generally be respected [I]t is error to allow the dramatic nature of a variance to unduly influence our review for substantive reasonableness.”); *United States v. Mayberry*, 540 F.3d 506, 519 (6th Cir. 2008) (“[T]his Court applies a great deal of deference to a district court’s determination that a particular sentence is appropriate.”); *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008) (“Th[is] court, however, owes deference to the district court’s determination of the appropriate sentence . . . and may not reverse the district court’s ruling just because it would have determined that an alternative sentence was appropriate.”); *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008) (“[W]e may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence.”); *United States v. Braggs*, 511 F.3d 808, 812 (8th Cir. 2008) (“On appeal, we

considered en banc the scope of appellate review of substantive reasonableness.⁶³ Two of those circuits, the Second and the Eighth, concluded, like the majority in *Irey*, that review for substantive reasonableness means that an appellate court must, in some sense, second-guess the weighing of sentencing factors by the district court.⁶⁴ But the Third Circuit, by an 8-5 vote, ruled, consistent with Judge Edmondson's dissent in *Irey*, that "if the district court's sentence is procedurally sound, [the circuit court] will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided."⁶⁵

Judge Steven Colloton expressed the view of perhaps most circuit judges when he stated that the decisions of the Supreme Court have offered little "principled basis on which to conduct a consistent and coherent appellate review for reasonableness,"⁶⁶ but so long as "[s]ubstantive reasonableness review endures, . . . there must be at least a 'shocks the conscience' sort of constraint on district judges."⁶⁷ Justice Antonin Scalia's prediction in *Booker* that review for reasonableness would "produce a discordant symphony of different standards, varying from court to court and judge to judge,"⁶⁸ was not far off the mark.

One important perspective about the post-*Booker* guidelines comes from the Department of Justice, and it is not a fan of recent developments. On June 28, 2010, the Criminal Division of the Department of Justice sent the United States Sentencing Commission an annual report on the operation of the guidelines, which "suggest[ed] that federal sentencing practice is fragmenting into at least two distinct and very different sentencing regimes."⁶⁹ The Department expressed its concern that "this evolution" of two regimes "leads to unwarranted sentencing disparities;" "will, over time, breed disrespect for the federal courts;" and undermines the "certainty in sentencing [that] is critical to reducing crime rates further and deterring future criminal conduct."⁷⁰ This critical perspective of the post-*Booker* system may

will review a sentence for an abuse of discretion, giving due deference to the district court's decision."); see also *Gall v. United States*, 552 U.S. 38, 51–52 (2007).

⁶³ *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc); *United States v. Tomko*, 562 F.3d 558, 578 (3d Cir. 2009) (en banc); *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc).

⁶⁴ *Feemster*, 572 F.3d at 461 ("A district court abuses its discretion when it . . . considers only the appropriate factors but in weighing those factors commits a clear error of judgment."); *Cavera*, 550 F.3d at 191 ("At the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it.").

⁶⁵ *Tomko*, 562 F.3d at 568.

⁶⁶ *Feemster*, 572 F.3d at 467 (Colloton, J., concurring).

⁶⁷ *Id.* at 468.

⁶⁸ *United States v. Booker*, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

⁶⁹ Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, Criminal Div., U.S. Dep't Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n 1, 1 (June 28, 2010) (on file with author) [hereinafter Letter to Sessions].

⁷⁰ *Id.* at 2.

find a receptive audience in Congress in the not-too-distant future.

The Department importantly recognized that, in the new second regime of sentencing, which “has largely lost its moorings to the sentencing guidelines,”⁷¹ there are categories of “offense types for which the guidelines have lost the respect of a large number of judges.”⁷² The Department included “some child pornography crimes and some fraud crimes”⁷³ as among those offense types, but failed to mention the guidelines that govern offenses regarding crack and powder cocaine, which for years have been the subject of fierce debate, litigation, and amendment.⁷⁴

The Department proposed that the Sentencing Commission soon “should prepare a comprehensive report on the state of federal sentencing.”⁷⁵ The Department suggested that the report “address systemic concerns and ensure that the principles of sentencing reform—predictability, elimination of unwarranted disparity, and justice—are achieved.”⁷⁶ It also advocated that the Commission “explore how to create a single sentencing regime that will earn the respect of the vast majority of judges, prosecutors, defense attorneys, and the public.”⁷⁷ Conspicuously missing from that list of interested parties were the states.

II. THE STRUCTURAL PROBLEM: THE FEDERALIZATION OF CRIME

Many of the challenges that confront both the states and the federal system after *Blakely* and *Booker* are the product of a structural problem: the federalization of crime. My colleague on the Sixth Circuit, Jeffrey Sutton, made this point about the federal system four years ago:

Any long-term effort to respect the virtues of individualized sentencing and consistency should account for the role that the federalization of crime has played in creating the problem. It is one thing for a state such as Ohio to develop criminal laws and ranges of criminal punishments for 11.4 million people who live within 41 thousand square miles; it is quite another for Congress to undertake the same task for 299 million people who live within 3.5 million square miles. While Ohio has no obligation to sentence those who commit drug offenses within its borders consistently with those who do the same in North Dakota, Congress does have such an obligation. Anyone interested in balancing consistency with individualized sentencing ought to acknowledge that the task is harder for the Federal Government than for a State, and ought to keep that

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *Kimbrough v. United States*, 552 U.S. 85, 94–100 (2007).

⁷⁵ Letter to Sessions, *supra* note 69, at 2.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

in mind each time someone proposes federalizing a new area of crime. Criminal law experiments unleashed on 300 million people are as difficult to implement and monitor as they are to change.⁷⁸

The federal criminal laws and our corresponding system of sentencing are creating unjust disparities and burdening federal courts by trying to do too much for too many in our diverse national republic.⁷⁹ Criminal laws remain the primary responsibility of the states, but federal criminal laws now regulate many traditional crimes of local concern involving drugs, guns, robbery, and fraud.⁸⁰ Among the most controversial guidelines are those that concern the punishment of local crimes involving drugs, guns, and obscenity.⁸¹ The huge growth of the federal government since 1937 and its ability to tax and spend, virtually without constitutional constraint,⁸² has made it relatively easy for Congress to embark upon an imbalanced program of large-scale incarceration that represents a minuscule percentage of the federal budget.⁸³

To understand this structural problem, consider the fiscal position of the states. One of the main reasons the state systems of sentencing guidelines have been more effective and popular is that the states necessarily must be cost-sensitive.⁸⁴ “Unlike the federal system, sentencing and punishment are significant portions of state criminal justice budgets; indeed, they are significant portions of state budgets as a whole.”⁸⁵ States can no longer afford the expensive and high-growth systems of incarceration that are the inevitable result of indeterminate sentencing.⁸⁶ States instead must manage their scarce prison resources and reserve them to incarcerate the most dangerous offenders.⁸⁷ They also must have an array of lower cost

⁷⁸ Sutton, *supra* note 54, at 91 (footnotes omitted).

⁷⁹ See generally Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 812 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980–82 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668–69 (1997); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 504–05 (1995).

⁸⁰ See REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW 5–7 (1998); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 51 (1998).

⁸¹ See Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 120 (2005); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 138 (2005).

⁸² See Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

⁸³ Barkow, *supra* note 36, at 1301.

⁸⁴ *Id.* at 1285–90.

⁸⁵ Miller, *supra* note 34, at 1391.

⁸⁶ Barkow, *supra* note 36, at 1285–90; Pryor, *supra* note 11, at 944–54.

⁸⁷ Barkow, *supra* note 36, at 1285–90; Pryor, *supra* note 11, at 944–54.

sentencing alternatives for lower risk offenders.⁸⁸

One of the financial struggles for the states is affording the start-up costs for the creation of a sensible system of sentencing.⁸⁹ It costs time and money to compile reliable data and build an effective guideline regime, but all the money these days comes from Washington, D.C. States depend on federal stimulus dollars to balance their budgets, and unlike the federal government, states are constitutionally required to balance their budgets.⁹⁰

The financial struggles of the states also explain why the federal government has embarked on its large-scale program of crime control and incarceration. States with underfunded and often indeterminate sentencing fail to control crime effectively, so local officials turn to federal officials for assistance. Federal political officials are responsive. The federal government has the financial ability to remove bank robbers, drug dealers, con artists, and other criminals swiftly and certainly from the community and incarcerate them for a long period when states cannot do so,⁹¹ and federal politicians reap the credit for that success.⁹²

This structural problem of an imbalance of federal and state power in criminal sentencing has been exacerbated by the blunt exercise of federal judicial power in a series of decisions by the Supreme Court about sentencing that are “at best confusing, at worst conceptually incoherent.”⁹³ Bowman has explained that the “odd” result of the decision in *Blakely* is that it has recognized a right to factual findings by a jury in a hearing for structured sentencing while leaving intact systems of indeterminate sentencing where judicial discretion is both unreviewable and arbitrary.⁹⁴ That paradox is rooted in the failure of the Court to distinguish between offense facts, which are historically found by a jury at trial, and offender facts, which historically are found by a judge at sentencing.⁹⁵

Justice O’Connor will be missed as an eloquent defender of sentencing reform, but Justice Samuel Alito appears to be a worthy successor on this front. His dissenting opinion in *Gall v. United States* ably refuted the argument, from the perspective of an originalist, that the Sixth Amendment bars factual findings by

⁸⁸ Barkow, *supra* note 36, at 1285–90; Pryor, *supra* note 11, at 944–54.

⁸⁹ See Pryor, *supra* note 11, at 951–54.

⁹⁰ Barkow, *supra* note 36, at 1290.

⁹¹ See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 108 (1999) (noting that, while states will often struggle to meet the costs of large increases in incarceration level, even a huge increase in federal prisoners does not have a significant impact on federal budgetary realities).

⁹² *Id.* at 107–08 (noting that members of Congress are frequently eager to promote their “tough on crime” credentials).

⁹³ Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 37 (2006); see also Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010).

⁹⁴ Bowman, *supra* note 51, at 257.

⁹⁵ Berman & Bibas, *supra* note 93, at 54–59; see also Berman, *supra* note 1.

judges in sentencing,⁹⁶ and his dissenting opinions in both *Gall*⁹⁷ and *Cunningham v. California*⁹⁸ manifest a deep respect for the virtues of sentencing guidelines. We should hope that other new members will also appreciate the virtues of sentencing reform in our constitutional order.

III. PROPOSALS FOR SENTENCING REFORM THAT RESPECT FEDERALISM

One answer to the current challenges to sentencing reform is to add federalism to our national conversation. A comprehensive report on sentencing by the U.S. Sentencing Commission, as the Department of Justice suggests, is a good idea, but one of the subjects of the report should be the balance of federal and state power. The Commission should consider and evaluate to what extent the problems of disparities, complexity, and unpopularity of the post-*Booker* guidelines are related to the federalization of crime. The Commission should evaluate to what extent federal prosecutions of certain types occur more frequently in states with failed indeterminate systems and less frequently in states with successful guideline systems. It should ask to what extent federal judges disrespect guidelines where the underlying crimes are more local in nature and differences of opinion about punishment vary more by region. It should consider whether sentencing disparities occur under the advisory guidelines either on a regional basis from one district to another or within districts from one judge to another, and should consider what those disparities mean with respect to federalism. The Commission is in a better position than most institutions to ask what federal sentencing policies and practices tell us about the balance of federal and state powers.

There are a host of reforms that federal and state officials together could initiate to address the problem of the federalization of crime. Some reforms would be ambitious, and others would be smaller in scale.

The most ambitious idea would be to have Congress, with the assistance of the Commission and perhaps The American Law Institute, overhaul all federal criminal laws to create a modern code. We would not have to reinvent the wheel in that effort. Beginning in the late 1960s and ending in the early 1980s, there was a serious and bipartisan, although unsuccessful, effort “to draft a modern federal criminal code.”⁹⁹ A commission chaired by former California governor Edmund Brown proposed a reformed code in 1971, and a bill passed the Senate, but failed in

⁹⁶ 552 U.S. 38, 64–66 (2007) (Alito, J., dissenting).

⁹⁷ *Id.* at 61–73.

⁹⁸ 549 U.S. 270, 297–310 (2007) (Alito, J., dissenting).

⁹⁹ Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 225 (1997); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 202 (1997) [hereinafter Joost, *Federal Criminal Code Reform: Is It Possible?*]; see also Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 PEPP. L. REV. 1 (1986) [hereinafter Joost, *Simplifying Federal Criminal Laws*]; Edward M. Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979).

the House in 1978.¹⁰⁰ That earlier effort provides a blueprint for the resolution of many issues, including the general provisions, analytic structure, system for interpretation, and system of offenses of a reformed code.¹⁰¹ That earlier effort also offers lessons about how to achieve a political consensus where the earlier effort failed.¹⁰²

Ironically, the federal sentencing guidelines were adopted as a result of the earlier and otherwise unsuccessful effort to create a modern federal criminal code, and in many respects the guidelines became the new code.¹⁰³ "The guidelines are a systematic body of law in which a large corpus of material relating to offenses and the sentences that should be imposed on defendants convicted of them have been collected and organized,"¹⁰⁴ but the guidelines serve as a complex tail-wagging-the-dog effort to reform the federal criminal laws.¹⁰⁵ The drafters of the federal guidelines were

faced with the task of rationalizing the buzzing confusion of the federal criminal "code," which by then had added to the dense jungle of common-law distinctions and traditional statutes any number of novel genetically[] engineered products of the mad legislator's laboratory—RICO, money laundering, carjacking, and a host of jurisdictionally warped variants involving mail, travel[,] and the high seas.¹⁰⁶

The unwieldy and disorganized nature of the federal criminal laws is a major reason that the federal guidelines rely on real-offense findings; it is difficult to devise a sensible system of sentencing for broad crimes, like mail fraud, that involve a wide range of schemes, offenders, and victims. The federal government still needs "a code of offenses that is brief, easy to understand, and easy to apply."¹⁰⁷

The states have had a decided advantage in creating workable guidelines based

¹⁰⁰ Robinson, *supra* note 99, at 225; see also John Quigley, *The Federal Criminal Code Revision Plan: An Epitaph for the Well-Buried Dead*, 47 GEO. WASH. L. REV. 459, 459 (1979).

¹⁰¹ Robinson, *supra* note 99, at 227–34.

¹⁰² See Joost, *Federal Criminal Code Reform: Is It Possible?*, *supra* note 99, at 203–10, 213–23; Joost, *Simplifying Federal Criminal Laws*, *supra* note 99.

¹⁰³ Kenneth R. Feinberg, *Sentencing Reform and the Proposed Federal Criminal Code*, 5 HAMLINE L. REV. 217, 217 (1982); see also Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 FED. SENT'G REP. 118, 118 (1994); Edward M. Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423, 425 (1980); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 355 (1979).

¹⁰⁴ Joost, *supra* note 103, at 119.

¹⁰⁵ See Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENT'G REP. 112, 112–14 (1994).

¹⁰⁶ *Id.* at 113.

¹⁰⁷ Joost, *supra* note 103, at 120.

on a modern criminal code.¹⁰⁸ Most states adopted the Model Penal Code long ago, and the coherence of their codes has made the task of developing corresponding guidelines easier.¹⁰⁹ Their successful experiences with sentencing reform corroborate the view that our hodgepodge collection of thousands of federal criminal laws badly needs reform.

One of the controversies of the earlier effort to create a modern code to be avoided by new reformers was the concern that the code “would have greatly extended federal criminal jurisdiction.”¹¹⁰ “Both devoted liberals and dedicated conservatives . . . fear[ed] that the code would move the United States . . . toward a centralized criminal justice system and a national police force.”¹¹¹ A new code should adhere to fundamental principles of constitutional structure and political economy to limit federal criminal jurisdiction.¹¹² A federal criminal code should respect federalism. A modern code could be radically limited, but it need not be. A modern code could be both pragmatic and far more respectful of federalism than the current federal criminal laws. Code reforms would necessarily include offenses that are the exclusive or dominant concern of the federal government, but would also likely include offenses that are better prosecuted by federal authorities. In addition to addressing fundamental concerns about crimes on the high seas and at the borders, crimes against the federal government and national security, crimes in interstate and international markets, and crimes about civil rights, a modern, but streamlined, code could still enable federal authorities to prosecute organized crime, state and local government corruption, and other offenses that require independence, expertise, and intensive resources.¹¹³ But to the extent that a coherent federal criminal code respects federalism, the task of structured federal sentencing becomes less complicated and controversial. State legislatures, sentencing commissions, and law institutes also could be part of this undertaking and could consider filling gaps that may exist in state criminal codes.

Another—and more modest—response to the problem of the federalization of crime would be to adjust the financial balance of our governments. The federal government should reduce the cost of its system and instead provide grants for states to start sentencing commissions, build data information systems, develop guidelines, and implement other sentencing reforms. Indeed, all federal funds for state criminal justice systems should be conditioned on the creation of model guideline systems that reflect local views of punishment and contain costs and

¹⁰⁸ Lynch, *supra* note 105, at 112–13.

¹⁰⁹ *Id.*

¹¹⁰ Quigley, *supra* note 100, at 459.

¹¹¹ Joost, *Simplifying Federal Criminal Laws*, *supra* note 99, at 26.

¹¹² See, e.g., Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 22–24 (1996) (suggesting four criteria to govern federal criminal jurisdiction).

¹¹³ See John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995).

prison population growth. More federal funds should be made available to assist states in the creation of effective alternatives to incarceration. These federal funds should be for start-up costs, not long-term maintenance, lest we worsen the imbalance of power, but the federal government could, without much sacrifice, underwrite these costs entirely. "The recent history of federal funding for state punishment policies suggests that federal initiatives can significantly shape state behavior."¹¹⁴ With its mounting budget deficits, the federal government will need to find more creative ways in the years ahead to reduce its long-term financial burdens, and states always need better ways to manage costs and balance their budgets.

Marc Miller wisely has suggested that a principal aim for federal funding of state sentencing reforms should be information sharing to promote the experimentation that has long been regarded as a virtue of federalism.¹¹⁵ "The scarcity of visible exchange of sentencing reform information between the states raises a fundamental challenge to the idea of states as laboratories so eloquently illuminated by Justice Brandeis"¹¹⁶ That challenge creates an opportunity: "Ironically the federal government may play an essential role in enabling the states to serve as the laboratories Justice Brandeis envisioned."¹¹⁷

Federal support for state sentencing reform fittingly would advance Judge Frankel's concern for protecting civil rights.¹¹⁸ State systems that ensure due process and promote equal protection in sentencing deserve federal support, and arbitrary systems deserve federal punishment. But the federal government needs to admit its own responsibility for the continued irrationality and disparity in sentencing.

A national conversation about this structural problem also might assist the Supreme Court in its decisions about sentencing. Because it is a central feature of our Constitution, federalism is a legitimate concern of both formalists and pragmatists on the Court, and sentencing reforms that deliberately respect federalism may win the respect of a broad majority on the Court too.

¹¹⁴ Miller, *supra* note 34, at 1393.

¹¹⁵ *Id.* at 1391-94.

¹¹⁶ *Id.* at 1393 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")).

¹¹⁷ *Id.* at 1394.

¹¹⁸ See Lynch, *supra* note 27, at 240 n.6; see also Miller, *supra* note 34, at 1391 ("There is a substantial federal interest in promoting wise and efficient criminal justice systems throughout the country.").

IV. CONCLUSION

In short, we need a national kick-start to sentencing reform following *Blakely* and *Booker*. We need to ask more fundamental questions about why the federal guidelines are disrespected and why successful state guideline systems have not been replicated more often. We need to start a dialogue about first principles as Judge Frankel did in the 1970s when he raised fundamental questions about due process and equal treatment. We need to study and understand the interplay of the federal and state systems of criminal justice. We need to stop thinking about the federal and state systems as independent and horizontal when they are, in fact, interdependent and vertical. We need to think seriously about federalism and sentencing reform.

